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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE MARILYN L. HUFF)

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>HECTOR ORTEGA-MENESES,<br><br>Defendant. | Criminal No. 08CR0444-MLH<br><br><br><br><br>MEMORANDUM OF POINTS AND AUTHORITIES |

**I.**

**INTRODUCTION**

Mr. Ortega-Meneses respectfully submits these initial Federal Rule of Criminal Procedure 12 motions. These motions are based upon the discovery received from the government thus far. Mr. Ortega-Meneses has yet to be granted access to his A-file documents though he believes that the viewing will be arranged soon. Mr. Ortega-Meneses cannot yet file his attack on the underlying removal/deportation because he has yet to receive and review the documents underlying this deportation and therefore he would only be able to file a skeletal version of the argument. Once the government has produced the relevant discovery, Mr. Ortega-Meneses will file his challenge.

**II.**

**STATEMENT OF FACTS**

This is based on discovery received from the government thus far. Mr. Ortega-Meneses does not necessarily agree with this statement of facts and reserves the right to take a contrary position at trial.

Mr. Ortega-Meneses came to the government's attention during a record review searching for deported aliens. On January 24, 2008, Immigration and Customs Enforcement Special Agents Ruiz, Willever, and Watkins, and Haynes went to 4322 Copeland Avenue, San Diego, Mr. Ortega-Meneses's family residence. The government gained entrance to the residents by asking to look for a fictitious person. Once inside, the government found and arrested Mr. Ortega-Meneses.

That same morning, Mr. Ortega was interrogated, given his Miranda rights and answered questions. This prosecution ensued.

**III.**

**PRODUCE DISCOVERY**

Mr. Ortega-Meneses has requested Rule 12, 16, and 26 by letter dated February 21, 2008 and by phone that same day. Mr. Ortega-Meneses reiterates that request now and asks that the Government produced all constitutionally and statutorily required discovery. The Government has produced 90 pages and a video-tape of Mr. Ortega-Meneses's statement thus far. The Government has not produced any statements of Mr. Ortega-Meneses or any other document regarding the lack of permission element. Mr. Ortega-Meneses would ask that the Government comply with Rule 16 and provide every document that it intends on relying upon to show that Mr. Ortega-Meneses failed to return without permission to the United States.

**IV.**

**THE ARREST OF MR. ORTEGA-MENESES WAS EFFECTUATED BY AN ENTRY INTO THE FAMILY HOME UNDER FALSE PRETENSES WHICH WAS UNLAWFUL AND REQUIRES SUPPRESSION OF ALL EVIDENCE DERIVED FROM THE UNLAWFUL ENTRY.**

According to the statement in support of the complaint, the agents gained entry into the Ortega family home by asking Mr. Ortega's father about a fictitious person that the elder Ortega denied knowing. The agents then asked to look around the residence to find this fictitious person when in reality they were looking for Hector Ortega-Meneses. The agents found Hector Ortega-Meneses and arrested him. This arrest was unlawful and all fruit of this unlawful arrest, including Mr. Ortega-Meneses's statements, should be suppressed.

The plain language of the Fourth Amendment condemns warrantless, unreasonable searches and seizures. U.S. Const. Amend. IV; Payton v. New York, 445 U.S. 573, 585 (1980). Searches and seizures inside a home are presumptively unreasonable. Payton, 445 U.S. at 586. This is because one of the core Fourth Amendment rights is the right of a person to retreat to his home and be free from unreasonable government intrusion. Id. at 589-590. The physical entry of the home is the chief evil at which the Fourth Amendment is directed. Welsh v. Wisconsin, 466 U.S. 740, 748 (1984).

To be valid, consent must be knowing and intelligent. United States v. Phillips, 497 F.2d 1131, 1135, N.4 (9th Cir. 1974). "Before a person can be deemed to have 'knowingly' consented, he must be aware of the purpose for which the agent is seeking entry." Id. A law enforcement agent, who is known to be such by the person with whom the agent is dealing, violates the Fourth Amendment's bar against unreasonable searches and seizures when he or she gains access to a

residence by misrepresenting the purpose, nature, or scope of his or her investigation. United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990). More specifically, "[a] ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent." Id. (emphasis added). For instance, in Phillips, this Court disapproved of the entry of agents who stated their purpose was to investigate a robbery, when in fact their true purpose was to arrest Phillips. 497 F.2d at1135 & n. 4.

The policy behind this Court's case law is clear:

> When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.

Bosse, 898 F.2d at 115 (quoting SEC v. ESM Government Securities, Inc., 645 F.2d 310, 316 (5th Cir. 1981)). In short, where government agents are known to be government agents, they cannot use a ruse to gain entry into an area to which they would otherwise not have access.

There is no explanation as to why the government had to resort to a ruse: no allegation of exigency, no reason given why a warrant could not be sought. Instead, this is an simply an end-run around the warrant requirement. As in Phillips, it cannot be said that the agents entered and were present in Mr. Ortega-Meneses's home for the "very purposes contemplated by the occupant." 497 F.2d at 1135. The agents did not state their true purpose for seeking entry into the home, which was to arrest Mr. Ortega-Meneses for an immigration violation. The Fourth Amendment was violated.

Evidence obtained in violation of the Fourth Amendment cannot be used in criminal proceedings. Weeks v. United States, 232 U.S. 383, 398 (1914). All tangible evidence seized after an illegal arrest is tainted by that illegality and must be suppressed. United States v. Mendoza-Ortiz, 262 F.3d 882, 885 (9th Cir. 2001).

1. Statements Should Be Suppressed

Statements are tainted fruit regardless of whether they are voluntary. Brown v. Illinois, 422 U.S. 590 (1975); Johnson, 626 F.2d at 757. Because the taint from the illegal search and detention was not sufficiently attenuated, all Mr. Ortega-Meneses' statements should be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). The pivotal question in determining attenuation is "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Id. at 487-88 (internal quotation marks omitted). In order to determine whether Mr. Ortega-Meneses' statement was "come at by exploitation of" the illegal detention, the court must consider three factors: (1) the temporal proximity of the illegal search and detention to the statement; (2) the presence of any intervening circumstances; and, (3) the "purpose and flagrancy" of the official misconduct. Taylor v. Alabama, 457 U.S. 687, 690 (1982); Dunaway v. New York, 442 U.S. 200 (1979). The "burden of showing admissibility rests, of course, on the prosecution." Brown, 422 U.S. at 591. The prosecution did not meet its burden.

**a. Mr. Ortega-Meneses' Statement Was Close in Time to the Illegal Detention**

According to Google maps, only a 7.3 mile drive to the Federal Building in San Diego separated Mr. Ortega-Meneses' illegal detention

and his interrogation. This brief interval between the illegal detention and the interrogation is insufficient to purge the taint. See, e.g., Brown, 422 U.S. at 604 (less than two hours not sufficient to purge taint); Taylor, 457 U.S. at 691 (six hours not sufficient); United States v. Perez-Esparza, 609 F.2d 1284, 1290 (9th Cir.1979) (three hours not sufficient).

**b. There Were No Intervening Circumstances Between the Time of the Illegal Arrest and Mr. Ortega-Meneses' Statement**

Fourth Amendment attenuation analysis focuses on the circumstances that serve the twin interests of the exclusionary rule: deterrence and judicial integrity. See, e.g., Brown, 422 U.S. at 599-600. This Court must look not at the defendant's conduct, but rather at "intervening events of significance" that "render inapplicable the deterrence and judicial integrity purposes that justify excluding [a tainted] statement." See United States v. Ricardo D., 912 F.2d 337, 343 (9th Cir.1990); Perez-Esparza, 609 F.2d at 1289. Intervening circumstances that militate in favor of attenuation must be sufficiently important to ensure that potentially tainted evidence was "come at by way of" some process other than the exploitation of an illegal search. Wong Sun, 371 U.S. at 487-88. Examples include release from custody, an appearance before a magistrate, or consultation with an attorney, "such that we would be able to say that [a defendant's decision to confess] was an 'unconstrained, independent decision' that was completely unrelated to [the] initial unlawful" violation. United States v. George, 883 F.2d 1407 (9th Cir. 1989).

There were no such intervening events here. After being awakened in his home early in the morning and being confronted by four agents, Mr. Ortega-Meneses was placed into an agent's car. He was taken, in

continuous law enforcement presence, directly from the site of his illegal detention to the site of his interrogation. He did not speak to an attorney nor anyone other than agents. No circumstances exist that would amount to an event of the type or significance necessary to purge the taint. Perez-Esparza, 609 F.2d at 1289.

**c. The Agents Flagrantly Broke the Law in Arresting Mr. Ortega-Meneses in His Home Without a Warrant**

The purposeful and flagrancy of the official misconduct prong suggests suppression if the law enforcement officials conducted the illegal search with the purpose of extracting the evidence in question, **or** if they flagrantly broke the law in conducting the search. See, e.g., Taylor, 457 U.S. at 693 (only "purpose"); Dunaway, 442 U.S. at 218-19, (only "purpose"); United States v. Jenkins, 938 F.2d 934, 941 (9th Cir.1991) (only "flagrancy"); George, 883 F.2d at 1416 (only "flagrancy").

Brown held the taint had not been purged where the arrest, both in design and in execution, was purely investigatory. 422 U.S. at 605. The Court held that the "purpose" of the detectives was impermissible because they "embarked upon this expedition for evidence in the hope that something might turn up." Brown, 422 U.S. at 605; see also Perez-Esparza, 609 F.2d at 1289 ("When police purposely effect an illegal arrest or detention in the hope that custodial interrogation will yield incriminating statements, the deterrence rationale for application of the exclusionary rule is especially compelling.").

In Taylor, the police effectuated an investigatory arrest without probable cause, based on an uncorroborated informant's tip, and involuntarily transported the defendant to the station for interrogation "in the hope that something would turn up." 457 U.S. at 693. Taylor

held, "the fact that the police did not physically abuse petitioner, or that the confession they obtained may have been 'voluntary' for purposes of the Fifth Amendment, does not cure the illegality of the initial arrest." Id.

Finally, New York v. Harris, 495 U.S. 14 (1990), does not foreclose relief. The Ninth Circuit held in United States v. Crawford, 372 F.3d 1048 (9th Cir. 2004) (en banc), that Harris limits Brown's application to Payton violations, Even so, Harris did not establish a per se rule; Harris did no more than establish that a Payton violation "*generally* does not lead to the suppression of a post-arrest confession." Powell v. Nevada, 511 U.S. 79, 85 n.* (1994) (emphasis added). See also Anderson v. Calderon, 232 F.3d 1053, 1071 (9th Cir. 2000), overruled on other grounds, Bittaker v. Woodford, 331 F.3d 715, 728 (9th Cir. 2003) (en banc) (describing Powell as "fram[ing] the holding in Harris"). Thus, Harris sets forth a general, not universally applicable, rule.

Here, given that the agents willfully evaded the warrant requirement and effected entry by lying to Mr. Ortega-Meneses father so that the agents could arrest Mr. Ortega-Meneses in the pre-dawn hours is egregious conduct which merits suppression.

2. Physical Evidence That Would Tend to Establish Mr. Ortega-Meneses' Identity Should Have Been Suppressed

The body or identity of a criminal defendant is not itself suppressible. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984). Thus, even if an unlawful arrest occurs, a defendant may be lawfully compelled to appear in court. United States v. Garcia-Beltran, 389 F.3d 864, 866 (9th Cir. 2004). However, evidence unlawfully obtained from a suspect must still be suppressed if that evidence was obtained for investigatory purposes; for example, to link an individual arrested near

the border to a criminal immigration law violation. Id. at 868.

In United States v. Guevera-Martinez, 262 F.3d 751 (8th Cir. 2001), the Eighth Circuit held that the defendant's fingerprints, obtained by exploiting the defendant's detention following an illegal traffic stop and arrest, must be suppressed in a subsequent prosecution for being an illegal alien in the United States. In so ruling, the court distinguished between jurisdictional challenges to identity evidence, see Lopez-Mendoza, 468 U.S. at 1039 (body or identity of defendant not suppressible in civil deportation proceeding), and evidentiary challenges to fingerprint evidence in criminal cases. Davis v. Mississippi, 394 U.S. 721 (1969) (fingerprint evidence suppressed in criminal case); Hayes v. Florida, 470 U.S. 811 (1985) (same). In both Davis, and Hayes, the Supreme Court held that fingerprints obtained as a result of constitutional violations and used for investigatory purposes must be suppressed in the criminal case flowing from that investigation. This Court should suppress any evidence gained from the fingerprinting of Mr. Ortega-Meneses as that was a direct fruit of the unlawful arrest.

**V.**

**THE INDICTMENT FAILS TO PROPERLY ALLEGE AN OFFENSE**

On February 14, 2008, the government obtained a one count indictment alleging the following:

> On or about January 24, 2008, within the Southern District of California, defendant HECTOR ORTEGA-MENSES an alien, who previously had been excluded, deported and removed from the United States to Mexico, was found in the United States, without the Attorney General of the United States or his designated successor, the Secretary of the Department of Homeland Security (Title 6, United States Code, Sections 202(3) and (4) and 557), having expressly consented to the defendant's reapplication for admission into the United States; in violation of Title 8, United States Code, Section 1326(a) and (b)

> It is further alleged that defendant HECTOR ORTEGA-MENSES was removed from the United States subsequent to March 23, 2005.

As written, the indictment fails to establish probable cause to believe that an offense was committed against the U.S.. This indictment allows the Grand Jury to find probable cause for this offense if it found that either the Attorney General or the Secretary of the Department of Homeland Security did not consent to Mr. Ortega-Meneses's reapplication to admission to the United States. Since the creation of the Department of Homeland Security, however, it is now clear that Section 1326 requires that United States prove that the Secretary of the Department of Homeland Security did not consent. See 6 U.S.C. § 557.[1] Section 557 went into effect on January 24, 2003. Since the indictment against Mr. Ortega-Meneses alleges a removal after March 23, 2005, the Attorney General has no role in deciding whether Mr. Ortega-Meneses has permission to enter or reside in the United States. As written, the grand jury could have found that Attorney General did not consent to Mr. Ortega-Meneses's reentry, but that would not create a valid charge of illegal entry after deportation under Section 1326.

A disjunctive indictment is insufficient unless both possibilities allow for a finding of probable cause. "[I]t is fatal for an indictment or information to charge disjunctively in the words of the statute, if the disjunctive renders it uncertain as to which alternative is

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[1] "With respect to any function transferred by or under this Act (including under a reorganization plan that becomes effective under section 1502 [6 USCS § 542]) and exercised on or after the effective date of this Act, reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred shall be deemed to refer to the Secretary, other official, or component of the Department to which such function is so transferred."

intended." 2 Wharton's Criminal Procedure § 291 (12th ed. 1975).[2] "If the indictment or information alleges the several acts in the disjunctive it fails to inform the defendant which of the acts he is charged with having committed, and it is insufficient." 1 C. Wright, Federal Practice and Procedure: Criminal 2d § , § 125 at 373-74. Binding precedent supports this interpretation:

> Once it is determined that the statute defines but a single offense, it becomes proper to charge the different means, denounced disjunctively in the statute, conjunctively in each count of the indictment." United States v. UCO Oil Co. 546 F.2d 833, 838 (9th Cir. 1976) (citing United States v. Alsop, 479 F.2d 65, 66 (9th Cir. 1973)), cert. denied, 430 U.S. 966, 97 S. Ct. 1646, 52 L. Ed. 2d 357 (1977).

If all powers have been transferred to the Secretary of the Department of Homeland Security, then the Attorney General's failure to consent is irrelevant. This indictment allows for a grand jury to find probable cause based on legally insufficient information. It should be dismissed. Further, Mr. Ortega-Meneses asks for disclosure of the grand jury transcripts pursuant to Federal Rule of Criminal Procedure 6(e)(ii) to avoid a variance at trial between what was shown to the grand jury regarding the lack of consent and the evidence admitted at trial.

## VI.

## THE GRAND JURY MISINSTRUCTION

### A. Introduction

This argument evolves from the original grand jury misinstruction

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[2] The Supreme Court has frequently relied upon the authors of the Model Penal Code on various issues. See, e.g., Liparota v. United States, 471 U.S. 419, 423 n.5 (1985). In addition, Congress is presumptively familiar with scholarly writing in mens rea issues. See Holloway v. United States, 526 U.S. 1, 9 (1999) (observing that "it is reasonable to presume that Congress is familiar with the scholarly writing" on conditional intent issue and citing authors of the Model Penal Code and Professor LaFave).

argument that was first considered in United States v. Marcucci, 299 F.3d 1156, 1158 (9th Cir. 2002), and his since enjoyed several iterations. The current point of dispute regards the dismissal of grand jurors who might not be inclined to indictment or who might consider punishment and the misinformation regarding the prosecutor's duty regarding exculpatory evidence. Mr. Ortega-Meneses believes that those dismissals violated the grand jury guarantee.

**B. Proceedings before the Grand Jury**

The transcripts of the grand jury instructions has now been revealed and discussed in several cases. Mr. Ortega-Meneses assumes that the transcripts are accurate and provide the basis for this motion. Mr. Ortega-Meneses can file a copy of the transcripts with the Court should it so desire.[3] First, the instructions forbid grand jurors from declining to authorize a prosecution for which there is probable cause because they do not agree with it. Second, the instructions advised the grand jurors that the prosecutor is obliged to present to them evidence that "cuts against what they may be asking [the grand jurors] to do if they are aware of that evidence."[4]

These instructions are explicitly based on the idea that the grand jury function is solely to assess probable cause.

> [T]he grand jury is determining really two factors: "do we have a reasonable belief that a crime was committed? And

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[3] These instructions were adduced in United States v. Martinez-Covarrubias, 07CR0491-BTM. Mr. Ortega-Meneses believes the Court is already familiar with and in possession of those transcripts.

[4] The transcript of the voir dire indicates that grand jurors were shown a video presentation on the role of the grand jury. Mr. Ortega-Meneses requests that the video presentation be produced. See United States v. Alter, 482 F.2d 1016, 1029 n.21 (9th Cir. 1973) ("[t]he proceedings before the grand jury are secret, but the ground rules by which the grand jury conducts those proceedings are not.").

> second, do we have a reasonable belief that the person that they propose that we indict committed the crime?"
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> If the answer is "yes" to both of those, then the case should move forward. If the answer to either of the questions is "no," then the grand jury should not hesitate and not indict.

The use of "should" here cannot be read to be anything other than mandatory: "should" cannot reasonably be read to mean optional when it addresses the obligation not to indict when the grand jury has no "reasonable belief that a crime was committed" or if it has no "reasonable belief that the person that they propose that we indict committed the crime."

This view must have been reinforced by the questioning of two potential grand jurors who indicated that, in some unknown set of circumstances, they might decline to indict even where there was probable cause. One thought drugs should legal and the other was not fond of immigration cases. The instructions clearly told them to ignore that part of their conscious

> Now, the question is can you fairly evaluate [drug cases and immigration cases]? Just as the defendant is ultimately entitled to a fair trial and the person that's accused is entitled to a fair appraisal of the evidence of the case that's in front of you, so, too, is the United States entitled to a fair judgment. If there's probable cause, then the case should go forward. *I wouldn't want you to say*, "well, yeah, there's probable cause, but I still don't like what our government is doing. I disagree with these laws, so I'm not going to vote for it to go forward." If that is your frame of mind, the probably you shouldn't serve. Only you can tell me that.

This lays bare the cordoning of the grand jury function because it told the grand jurors that considerations like that the grand juror "[didn't] like what our government is doing," but in which there was probable cause such a case "should go forward." This clearly tells grand jurors not to use their discretion.

This was plain in the instance of the grand juror who asked about

medical marijuana and the disparate state versus federal treatment of the issue.

> Well, those things -- the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that -- we tell trial jurors, of course, that they cannot consider the punishment or the consequence that Congress has set for these things. We'd ask you to also abide by that. We want you to make a business-like decision of whether there was a probable cause. ...

Again, this makes it clear that "should" meant "must."

This line of thought was further explored when the belief was expressed by a grand juror "that drugs should be legal." Kicking around this idea led to following instruction which said that (in a refrain popular with Justice Scalia in his discussions of abortion rights) that the remedy to bad laws is democracy and the legislative process.

> I can tell you sometimes I don't agree with some of the legal decisions that are indicated that I have to make. But my alternative is to vote for someone different, vote for someone that supports the policies I support and get the law changed. It's not for me to say, "well, I don't like it. So I'm not going to follow it here."
>
> You'd have a similar obligation as a grand juror even though you might have to grit your teeth on some cases. Philosophically, if you were a member of congress, you'd vote against, for example, criminalizing marijuana. I don't know if that's it, but you'd vote against criminalizing some drugs.
>
> That's not what your prerogative is here. You're prerogative instead is to act like a judge and say, "all right. This is what I've to deal with objectively. Does it seem to me that a crime was committed? Yes. Does it seem to me that this person's involved? It does." *And then your obligation, if you find those to be true, would be to vote in favor of the case going forward.*

Thus, the grand juror's duty is to conduct a simple two part test, which, if both questions are answered in the affirmative, lead to an "obligation" to indict.

Under this paradigm, grand jurors were then questioned about their potential to deviate from the "probable-cause" only test.

The Court: do you think you'd be inclined to let people go in

> drug cases even though you were convinced there was probable cause they committed a drug offense?
> REA: It would depend on the case.
> The Court: Is there a chance that you would do that?
> REA: Yes.
> The Court: I appreciate your answers. I'll excuse you at this time.

Here, the Grand Juror is excused because there was a question about whether something other than probable cause would prevent the juror from indicting.

This error is aggravated by the overstatement of the prosecutorial duty to disclose to the grand jury.

> Now, again, this emphasizes the difference between the function of the grand jury and the trial jury. You're all about probable cause. If you think that there's evidence out there that might cause you to say "well, I don't think probable cause exists," then it's incumbent upon you to hear that evidence as well. As I told you, in most instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence.

The antecedent to this instruction is also found in the impanelment. After advising the grand jurors that "the presentation of evidence to the grand jury is necessarily one-sided," that truth is undone somewhat by the statement that "[his] experience is that the prosecutors don't play hide-the-ball. If there's something adverse or that cuts against the charge, you'll be informed of that. They have a duty to do that." This is not a guarantee that could be enforced and thus it is unfair and untrue to inform the grand jurors that exculpatory evidence would be presented if it existed.

**C. Argument**

Mr. Ortega-Meneses believes that the above instruction of the grand jury was historically unfaithful to its role. As always, the context in which the right arose is an excellent starting point to decide what the right is supposed to be. One of the seminal cases for the grand jury

right involved precisely the kind of refusal to indict where probable cause existed. John Peter Zenger's case was twice presented to a grand jury for indictment on libel and sedition charges, but the grand jury would not authorize the charges. This required the governor to resort to filing an information that Alexander Hamilton ridiculed at trial?[5] Would the colonists have been as strongly supportive of the grand jury right? Would the Framers have included it in the Fifth Amendment?

We are no longer in the Navarro-Vargas majority's view which found that grand jurors could understand "should" as could rather than must. With the foregoing instructions to the January 2007 grand jury, that indulgence can no longer be had. Simply put, Navarro-Vargas's analysis entirely depends on that should/must distinction and it does not dispute that grand jurors do have the right to decline to indict. Navarro-Vargas supports the conclusion that these instructions run afoul of the Fifth Amendment.

In Navarro-Vargas, the Ninth Circuit narrowly upheld the unmodified model grand jury instructions given to the grand jury in that case, but not without "conced[ing] that there may be more done to further increase the shielding power of the modern federal grand jury," and explicitly "not [ ] hold[ing] that the current instructions could not or should not be improved." See Navarro-Vargas, 408 F.3d at 1208. Taken together, the voir dire of and instructions given to the January 2007 Grand Jury, go far beyond those at issue in Navarro-Vargas, taking a giant leap in the direction of a bureaucratic, deferential grand jury, focused solely upon probable cause determinations and utterly unable to exercise any quasi-prosecutorial discretion. That is not the institution the Framers

[5] See generally William R. Glendon, The Trial of John Peter Zenger, 68-DEC N.Y. St. B.J. 48, 50-51 (1996).

envisioned. See United States v. Williams, 504 U.S. 36, 49 (1992).

Everyone, including Mr. Ortega-Meneses, concedes that the grand jurors are not allowed to make up their own law; they do not sit in judgment of the legislators choice in deciding what conduct is prohibited. They do, however, stand in judgment as to each individual case in deciding whether a prosecution should be had or whether the matter being presented is a case of Government overreaching, too harsh a charge, or is otherwise unfit for prosecution. Indeed, that is a fundamental part of their constitutional discretion to not indict even if probable cause supports the charge. See Navarro-Vargas, 408 F.3d at 1200 (citing Vasquez v. Hillery, 474 U.S. 254, 263 (1986)).

The legitimacy of the discretion vested in grand jurors is made clear in *Vasquez*. That case ultimately held that racial discrimination in grand jury selection is, in effect, a structural error. One of the reasons why racial discrimination in grand jury selection is so prejudicial – even after a petit jury conviction – is that the grand jury enjoys broad discretion in choosing what to charge and whether to charge at all, even in a case where there is not only probable cause, but proof beyond a reasonable doubt. See Vasquez, 474 U.S. at 263. If a grand jury's discretion not to charge an offense, or to charge a lesser offense, was not a *legitimate* grand jury function, then *Vasquez* could not have relied upon that attribute in determining whether the error in that case merited reversal.

There is no doubt that the January 2007 Grand Jury was so instructed that probable cause was the beginning and the end of the inquiry for whether to indict.

> Court . . . If there's probable cause, then the case should go forward. I wouldn't want you to say, "Well, yeah, there's probable cause. But I

> still don't like what the government is doing. I disagree with these laws, so I'm not going to vote for it to go forward." If that's your frame of mind, then probably you shouldn't serve. Only you can tell me that.
>
> Prospective Juror: Well, I think I may fall in that category.
>
> The Court: In the latter category?
>
> Prospective Juror: Yes.
>
> The Court: Where it would be difficult for you to support a charge even if you thought the evidence warranted it?
>
> Prospective Juror: Yes.
>
> The Court: I'm going to excuse you then.

That cannot be spun to be anything other than it is: a juror being excused for indicating that should could be understood as "possibly" rather than must. This point is clear from the case "should go forward" language and the disapproval of any dissent from that. ("I wouldn't want you [to vote against such a case]"). The sanction for the possibility of independent judgment was dismissal, a result that provided full deterrence of that juror's discretion and secondary deterrence as to the exercise of discretion by any other prospective grand juror.

Though one uncured, corrosive instruction should be sufficient to taint the grand jurors, in this case the process was catalyzed.

> Court . . . It's not for me to say, "Well, I don't like it. So I'm not going to follow it here."
>
> You'd have a similar *obligation* as a grand juror even though you might have to grit your teeth on some cases. Philosophically, if you were a member of Congress, you'd vote against, for example, criminalizing marijuana. I don't know if that's it, but you'd vote against criminalizing some drugs.
>
> That's not what your *prerogative* is here. Your prerogative instead is act like a judge and to

> say, "All right. This is what I've got to deal with objectively. Does it seem to me that a crime was committed? Yes. Does it seem to me that this person's involved? It does." *And then your obligation, if you find those things to be true, would be to vote in favor of the case going forward*.

After telling this potential juror (REA) what his obligations and prerogatives were, the Court inquired as to whether "you'd be inclined to let people go on drug cases even though you were convinced there was probable cause they committed a drug offense?" The potential juror responded: "It would depend on the case." Nevertheless, that juror was excused. Again, in this context, and contrary to the situation in Navarro-Vargas, "should" means "shall"; it is obligatory, and the juror has no prerogative to do anything other than indict if there is probable cause.

Moreover, as this example demonstrates, the issue is not limited to whether the grand jury believes a particular law to be "unwise." This juror said that any decision to indict would not depend on the law, but rather it would "depend on the case." Thus, the rule of "must" rather than should is being applied for *every* case, rather than being case specific. It is equally clear that the prospective juror did not dispute the "wisdom of the law;" he was prepared to indict under some factual scenarios, perhaps many. It was only the discretion that led to his dismissal.

Consider also the following: "[W]hat I have to insist on is that you follow the law that's given to us by the United States Congress. We enforce the federal laws here." And then again, after swearing in all the grand jurors who had already agreed to indict in every case where there was probable cause, the point was reiterated that "should" means "shall" when the grand jurors were reminded that "your option is not to

say 'well, I'm going to vote against indicting even though I think that the evidence is sufficient . . . . Instead your *obligation* is . . . not to bring your personal definition of what the law ought to be and try to impose that through applying it in a grand jury setting."

Plainly, the penalty question was removed from the grand jury:

> Prospective Juror (REA): ... And as far as being fair, it kind of depends on what the case is about because there is a disparity between state and federal law.
>
> The Court: In what regard?
>
> Prospective Juror: Specifically, medical marijuana.
>
> The Court: Well, those things -- the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that -- *we tell trial jurors, of course, that they cannot consider the punishment or the consequence that Congress has set for these things. We'd ask you to also abide by that.* We want you to make a business-like decision of whether there was a probable cause. ...

A "business-like decision of whether there was a probable cause" would obviously leave no role for the consideration of penalty information.

The dismissal of these two grand jurors and its affect on the other grand jurors made one clear message: indict in every case where there is probable cause or you will be excused as being unfit for this service. The remaining grand jurors could not have understood the actions any other way. Consequently, to the extent that the Court in Navarro-Vargas took solace in the fact that the structure of the grand jury with its secrecy and unreviewability allows grand juries to continue exercising their full prerogatives, 408 F.3d at 1200, *this* particular grand jury could not have felt so emboldened.

Finally, the duty to present exculpatory evidence is just not true. Even if true, the statement that "you can expect that the U.S. Attorneys that will appear in front of you will be candid, they'll be honest, that

they'll act in good faith in all matters presented to you." That might well state the *probable* case, but if it is given in every case it will certainly prove not to be true sometimes. These vouching-type instructions, coupled with the creation of a misleading suggestion that "in most instances" prosecutors were "duty-bound" to present anything that is "adverse or cuts against the charge," informs grand jurors that it is likely that there is no evidence that qualifies as "adverse or cuts against the charge."

As an investigative body, it is the grand jury's responsibility to find the facts. See United States v. Sells Engineering, 463 U.S. 418, 423 (1983) (the grand jury "has always been extended extraordinary power of investigation and great responsibility for directing its own efforts . . . ."). Here, the instructions are telling them not to exploit that power because of the "candid," "honest," "duty-bound" prosecutor would have presented such evidence if an investigation could have turned it up. Thus, there is no need to investigate, and certainly no need to act as a vigorous check on charging decisions made by "candid," "honest," "duty-bound" public servants. The end result, then, is that grand jurors should consider evidence that goes against probable cause, but, if none is presented by the government, they can presume that there is none, or if some is presented, it represents the universe of all available exculpatory evidence. This simply is not the case, and the grand jury's independence and investigatory powers are unconstitutionally impinged upon by these instructions. These instructions are not supported by the Constitution, caselaw, or even the U.S. Attorneys' own code of conduct, and they devastate any notion of the grand jury's protective powers.

We know that the statement is not a correct recitation of law.

United States v. Williams, 504 U.S. 36, 49 (1992). It is also not really a correct recitation of the facts either. The instruction that prosecutors would present anything "adverse or that cuts against the charge" can also be fairly understood to include any evidence that undercuts guilt, impeachment information concerning the sources of information presented to the grand jury that might cast doubt upon the information's accuracy, any evidence that would undercut an element of the charge, or any evidence of an affirmative defense. Not even the United States Attorney Manual -- that unenforceable body of rules and rights -- requires such an outcome. Section 9-11.223 states that the prosecutor must disclose evidence that "directly negates the guilt of a subject of the investigation." Thus, even evidence that has a reasonable probability of undercutting guilt if effectively used by the defense, evidence that meets the constitutional standard of materiality for purposes of trial, see United States v. Bagley, 475 U.S. 667, 676 (1985), might not even rise to the "directly negates" standard governing disclosure to grand juries. As for the other types of evidence listed above, § 9-5.001 demonstrates that under the government's definitions, such exculpatory information is not even considered to be material to a finding of guilt, much less "directly negat[ing]" a finding of guilt.

Section 9-5.001 defines two different sorts of exculpatory and impeachment evidence: that which the government believes is constitutionally or legally required and that which is exculpatory or impeaching beyond that which is constitutionally and legally required. See id. at 9-5.001(B). Section 9-5.001 defines exculpatory and impeachment evidence that the government defines as being beyond the scope of what is "constitutionally and legally required." According to the USAM, such information is "relevant exculpatory or impeachment

information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence." USAM § 9-5.001. In other words, such evidence is that which does not "directly negate[]" guilt. Compare USAM § 9-11.223.

This evidence and information which the prosecutor is duty-bound to present for purposes of trial and other court proceedings, but not to the grand jury who was instructed that it would be presented with anything "adverse or that cuts against the charge" includes:

--evidence that "is inconsistent with any element of any crime charged against the defendant,"

--evidence that "establishes a recognized affirmative defense," and

--evidence in the form of impeachment information that "either casts a substantial doubt upon the accuracy of any evidence--including but not limited to witness testimony--the prosecutor intends to rely on to prove an element of any crime charged."

USAM § 9-5.00(C)(1), (2).

As noted above, § 9-5.001, by its own explicit terms, does not apply to the prosecutor's separate, limited duty to disclose exculpatory information to the grand jury. However, it does shed light on what the government considers to be evidence that "directly negates" guilt, and such limited evidence falls unjustifiably short of what the grand jurors were instructed that they would receive.

Further, whatever guidance a prosecutor gets from the U.S. Attorney Manual is just guidance because it does not create rights or remedies. In short, a grand jury misled into believing that the failure to present evidence that is "adverse" or that "cuts against" probable cause, will assume that there is no such evidence, leading it to inaccurate probable cause determinations and stunting its development of the independent investigations anticipated by the Framers. See Sells Engineering, 463

U.S. at 423 (emphasizing the grand jury's power of independent investigation).

**D. Prejudice**

Mr. Ortega-Meneses, society, and the Constitution are entitled to the "traditional functioning of the institution that the Fifth Amendment demands," *see* Williams, 504 U.S. at 51. The grand jury must be given the powers that our Framers instilled in it and the Supreme Court explicated in Vasquez. This error strikes at the structure of our government. See Navarros-Vargas, 408 F.3d at 1214, 1216-17 (Hawkins, J., dissenting). Accord Navarros-Vargas, 367 F.3d at 903 (Kozinski, J., dissenting). It is impossible to know how a properly instructed grand jury -- one that did not believe that its sole function was probable cause determination -- would evaluate "the need to indict" in a particular case, see Vasquez, 474 U.S. at 264, there are benefits to encouraging the grand jury to actually exercise its meaningful discretion to investigate which may lead it to uncover still more facts that may affect its assessment of the case. See Sells Engineering, 463 U.S. at 423 (the grand jury "has always been extended extraordinary power of investigation and great responsibility for directing its own efforts . . . ."). No one can say what investigations may be prompted, nor can anyone know what facts would be developed. "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." See United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2565 (2006).

The grand jury's ability to apply its community perspective to the facts, and its potential to bring new facts to light by way of its self-directed investigations, "bear[] directly on the 'framework within which the [grand jury's screening function] proceeds.'" Gonzalez-Lopez, 126

S. Ct. at 2564-65 (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). The end result is similar to that in Gonzalez-Lopez. There, in analyzing the deprivation of the defendant's right to choice of counsel, the Supreme Court observed that "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." Id. at 2565. Here, we cannot know "what different choices [the grand jury] would have made" with respect to its screening or investigative functions had it been asked to exercise its full discretion, nor can "the impact of those different choices" be "quantif[ied]." See id. In short, facts provide context, context informs discretion, and discretion affects results in ways that cannot be predicted. The error is structural.

**VII.**

**FILE FURTHER MOTIONS**

Mr. Ortega-Meneses also requests that he be allowed to file further motions as new discovery demonstrates their necessity. Mr. Ortega-Meneses is not filing his collateral attack on the deportation yet as he has not had access to his A-file which is a prerequisite to filing the motion.

**VIII.**

**CONCLUSION**

Mr. Ortega-Meneses requests that the Court grant these motions and dismiss the case.

Respectfully submitted,

Dated: March 16, 2008

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